

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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 )  
 In Re: Bair Hugger Forced Air ) File No. 15-MD-2666  
 Warming Devices Products ) (JNE/DTS)  
 Liability Litigation )  
 )  
 ) Minneapolis, Minnesota  
 ) March 8, 2019  
 ) Courtroom 9E  
 ) 11:09 a.m.  
 )  
 )  
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**BEFORE THE HONORABLE DAVID T. SCHULTZ**  
**UNITED STATES DISTRICT COURT MAGISTRATE JUDGE**  
**(MOTION HEARING)**

APPEARANCES

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1                                   P R O C E E D I N G S

2                                   IN OPEN COURT

3  
4                   THE COURT: All right. Good morning, everyone.  
5 We're on the record in the Bair Hugger MDL. I believe it is  
6 Case No. 15-MDL-266.

7                   THE LAW CLERK: 6.

8                   THE COURT: 6. 2666. Okay.

9                   Counsel for the Plaintiff, if you would note your  
10 appearance for the record, please.

11                  MS. ZIMMERMAN: Good morning, Your Honor,  
12 Genevieve Zimmerman.

13                  THE COURT: Good morning.

14                  MR. GORDON: Good morning, Your Honor. Ben Gordon  
15 for Ms. Trombley.

16                  THE COURT: Good morning, Mr. Gordon,  
17 Ms. Zimmerman.

18                  MR. GOSS: Good morning, Your Honor. Peter Goss  
19 for Defendants.

20                  THE COURT: Good morning, Mr. Goss.

21                  MS. HARRIS: Good morning. Charmaine Harris for  
22 the Defendants.

23                  THE COURT: I didn't hear your last name.

24                  MS. HARRIS: Charmaine Harris.

25                  THE COURT: Oh, good morning, Ms. Harris. Okay.

1 MS. HARRIS: Good morning.

2 THE COURT: Well, I have read everything that was  
3 submitted, and I'm happy to hear whatever arguments we have,  
4 okay?

5 MS. ZIMMERMAN: Thank you, Your Honor. And may it  
6 please the Court, Genevieve Zimmerman here on behalf of the  
7 MDL Plaintiffs. We have had the opportunity to be in front  
8 of Your Honor and this court on a number of issues of late,  
9 but also with respect to motions to strike expert reports  
10 and expert testimony obviously in the past six months or so.  
11 Your Honor is aware the Defendants brought a motion to  
12 strike expert reports the Plaintiffs had disclosed in the  
13 Axline matter, though their motion to strike was also  
14 captioned in the general MDL, and that's principally why we  
15 followed suit here in this instance.

16 That motion practice was, I believe, September,  
17 and we had an order from Judge Ericksen then affirming  
18 Your Honor's decision to strike our expert reports, and that  
19 was Document 1580, which was filed on November 6th of 2018.

20 Fast forward now, we have the Trombley matter.  
21 Plaintiffs have disclosed two case-specific experts; one  
22 from Dr. William Jarvis who is an infectious disease doctor,  
23 and then, two, from Dr. Brown who is a nephrologist, and he  
24 is really not speaking in any way to the Bair Hugger  
25 specifically, but really to the kind of kidney damage and

1 issues that he believes Ms. Trombley has suffered as a  
2 result of the infections that she had.

3           Shortly after disclosing those reports -- and  
4 actually I'm thinking about timing, I know both of those  
5 doctors have been deposed already -- Defendants then  
6 disclosed six different case-specific expert reports in the  
7 Trombley matter. Most of those experts are experts that we  
8 have dealt with throughout the course of this case in terms  
9 of general causation and case-specific. Many of them have  
10 been here or upstairs, I guess, when we tried the Gareis  
11 case. So some of their -- their generalized opinions are  
12 certainly something that we're well aware of. The reason  
13 for the motion to strike is that they have significantly  
14 supplemented their opinions with respect to general  
15 causation issues in our estimation, including what we would  
16 call backfilling with citations and things like that that  
17 were available at the time of their original report.

18           Additionally, as we detail in our motion papers, a  
19 number of these expert reports we really don't believe are  
20 truly rebuttal reports. You know, by way of example, I  
21 would turn the Court to, you know, Exhibit 1 in our  
22 response, which is the report of Dr. Abraham, and he says  
23 right, you know, in the first paragraph of his report, In  
24 this report, I expand on the opinions I expressed in my  
25 earlier reports. There was no CFD engineer disclosed in

1 Trombley, so anything that he's doing here is -- is not  
2 truly rebutting anything that was provided in Trombley;  
3 rather, it is supplementing with additional citations, many  
4 of which were available beforehand, and we think that that's  
5 improper rebuttal.

6 THE COURT: Is -- Let me stop you there for a  
7 second. So obviously I haven't read the Gareis trial  
8 transcript, but your CFD expert, Elghobashi?

9 MS. ZIMMERMAN: Excellent. Yes, Your Honor.

10 THE COURT: Okay. He testified in Gareis; right?

11 MS. ZIMMERMAN: Absolutely, Your Honor.

12 THE COURT: So -- And did he testify to both the  
13 general -- his general causation opinions and then specific  
14 to Gareis?

15 MS. ZIMMERMAN: Yes, yes, Your Honor, he did.

16 THE COURT: So here's my -- here's my concern.  
17 I'll be upfront with you about Abraham. I think it's the  
18 report about which I have the greatest concern to be honest  
19 with you. It seems like there's a whole bunch of -- it may  
20 not be CFD, but airflow general causation-type background  
21 that seems new to me.

22 MS. ZIMMERMAN: We agree, Your Honor.

23 THE COURT: I thought you might.

24 MS. ZIMMERMAN: Well, and, you know, I think that  
25 at the end of the day, the -- the timeline of the expert

1 reports here is kind of actually interesting. So  
2 Dr. Abraham, in his various depositions, has testified that  
3 the CFD that he did, he completed in 2015. It was before  
4 Science Day in this case. It was before he ever knew about  
5 who Dr. Elghobashi was, so the work that he did was really  
6 truly not rebuttal ever. It was his own study. And we can  
7 take issue with that; but, you know, one of the issues that  
8 has percolated up through these briefs is, you know, what's  
9 rebuttal, what's sur-rebuttal, what's permissible, you know,  
10 and I understand that all of that is important. But in  
11 terms of who had what documents and who was really  
12 responding, I guess, to different kind of experts, it's  
13 actually true that what Abraham did was not actually a  
14 response to Elghobashi, because that wasn't produced until  
15 the end of March of '17. Now they are both doing kind of  
16 their own studies, I guess, and really that's what the fact  
17 finder is for, to figure out, you know, which -- which  
18 version holds water.

19 But in terms of whether or not Abraham was really  
20 a rebuttal -- I mean, and I know that some of the briefing  
21 presented to this Court has said, look, Plaintiffs have had  
22 his CFD forever because there happened to be some YouTube  
23 videos. It's true that there are some YouTube videos of  
24 what Abraham claims he did. We did not, however, have a  
25 copy of his report or any of his CFD until the time that

1 expert reports were made, which, from Defendant's  
2 perspective, I believe was June of 2017; so while Elghobashi  
3 did his study and he did use many of the same inputs that  
4 Abraham did based on information available on this YouTube  
5 video, it's not as if we had his written report beforehand.  
6 And that's kind of getting into the weeds, I guess, on  
7 issues that have been before the Court about rebuttal or  
8 sur-rebuttal and whether or not Dr. Nathan Bushnell was  
9 properly disclosed and that sort of thing.

10 But really focussing on what Abraham has disclosed  
11 with respect to Trombley, this isn't -- I mean, there was no  
12 CFD that was done in the Trombley OR by Dr. Elghobashi.  
13 He's done two; one on the Model 750, and then he did another  
14 CFD on the Model 505. And really the principal difference  
15 is that while both of them show a statistically significant  
16 number of squames reaching the sterile field in less than a  
17 minute, they are slightly different because the airflow  
18 essentially is stronger in one model than the other, which  
19 is what he had opined on when he did his first CFD.

20 But then in an abundance of caution, and  
21 particularly knowing that the Gareis Bair Hugger model was a  
22 505, Dr. Elghobashi went back and actually did do the  
23 computational fluid dynamics on the 505 to say, yes, while I  
24 said I thought it would -- the same thing would happen, now  
25 I have done the study and I can show you exactly what does

1       happen with the 505. But he has not done anything for  
2       Trombley, and much like 3M has not done, you know,  
3       individual OR simulations for HCMC or, you know, Fairview  
4       Ridges or United Hospital across -- you know, across the  
5       river close to my house. They did do some CFD in the past,  
6       but they did one; and based on a model, then they go out and  
7       they market it as safe for use for everybody.

8               That's kind of frankly what's happened with  
9       Elghobashi. He's done CFDs on a model OR, and the only  
10      thing that's different in each one are the models of the  
11      Bair Hugger. There's a 750 and there's a 505. And  
12      Defendants did have the opportunity at trial in Gareis to  
13      cross-examine him and say, Well, isn't it true that the  
14      actual OR dimensions in the Gareis case were a little  
15      different than the ones that you modeled in your CFD? And  
16      he acknowledged, yeah, they are a little different. And his  
17      testimony at trial was, in my expert opinion, if -- you  
18      know, that he modeled a best case scenario OR, an OR that  
19      was, you know, technically very modern; and that if the Bair  
20      Hugger is impacting airflow in that modern OR, it's only  
21      going to be -- the effect of the Bair Hugger will only be  
22      worse in substandard operating rooms, and that's essentially  
23      what came out in Gareis.

24             So with respect to Dr. Abraham's report in  
25      Trombley, we just think that it is -- it's completely



1       improper and not rebuttal, and we think that it ought to be  
2       stricken.

3               THE COURT:   Here's -- Let me ask you this, so  
4       here's -- and maybe we do need to get further into the  
5       weeds, but here's -- here's what is troubling, I guess,  
6       about Abraham.   A lot of his report -- Let me back up.   I  
7       generally understand the notion that if you are going to  
8       opine on, you know, a specific plaintiff's case, you -- you  
9       obviously can't just do it in a vacuum.   You have to say,  
10      Hey, here's why this thing is important, and I get that.  
11      And I understand, and that's -- and that's going to  
12      necessarily sweep in what you could call general causation,  
13      because you have to have context for this.   What's a little  
14      bit troubling, and I'm sure Mr. Goss or Ms. Harris are  
15      champing at the bit to get up and talk about this, but if  
16      you look at Abraham's opinion, I don't know, the first  
17      whatever many pages are about airflow, if you will, fluid  
18      dynamics, generally.   There are photos of what happens when  
19      somebody walks.   There are photos, you know, around a  
20      doorway.   There are all sorts of sort of general causation  
21      things that say, you know, this is what happens in an  
22      operating room.   And I understand -- I'm sorry.   I know this  
23      is a long-winded question.   I understand that they can say  
24      and all these things were present or not present, as the  
25      case may be, in Ms. Trombley's operating theater, but it's

1 kind of like a lot of these things are present in every  
2 operating room. And so that's where I'm struggling, because  
3 if Dr. Abraham didn't disclose these before or there's not  
4 an expert who didn't disclose these things before, why isn't  
5 that new and general causation?

6 MS. ZIMMERMAN: Exactly, Your Honor. I mean --  
7 And I think part of it is that, you know, I assume everybody  
8 has talked to various members of the jury in Gareis, and  
9 they -- we both, I think, understand the import of various  
10 pieces of testimony, particularly doors opening, which was  
11 not in Dr. Abraham's first report, but was absolutely  
12 something the jurors latched onto. And so from our  
13 perspective, it was known and knowable. It goes to general  
14 causation. It wasn't in his first report, and he shouldn't  
15 be able to put it in here now and say, Oh, this is all  
16 Trombley specific. Because as Your Honor notes, a great  
17 deal of the report that's disclosed in Trombley really is  
18 very general. Certainly I understand that there needs to be  
19 some context provided, but -- but this is more than just  
20 context.

21 You know, additionally, while he has some -- you  
22 know, he has a number of pictures of -- you know, towards  
23 the back of the report of the operating room as it exists  
24 now, the operating room that Trombley was in, everybody  
25 knows that it's not -- there's no kind of foundation that

1 that's what the operating room looked like on the day of the  
2 Trombley surgery in 2015, I think it was. So, you know, and  
3 maybe that's -- you know, maybe that's going to be part of a  
4 motion in limine or some other, you know, kind of motion  
5 down the road if Dr. Abraham is permitted to go forward, or  
6 maybe there's an objection on just foundation because  
7 there's no foundation to say that this is actually, you  
8 know, a correct and true depiction of the operating room as  
9 it existed at the time of the surgery. But I guess that is  
10 kind of a small piece of the broader issue that we have.  
11 And he's disclosed a 36-page report when there was no CFD  
12 expert provided in the Trombley matter.

13 And so we really think that, you know,  
14 particularly with respect to Dr. Abraham, and you can see  
15 from the citations in terms of, you know, the years for the  
16 various reports, a great number of these citations were  
17 available certainly well before his general causation report  
18 was due. I mean the very first one he cites to, Whyte, is  
19 from 1974, '76.

20 THE COURT: Hang on, Ms. Zimmerman. I think you  
21 might be going a little fast.

22 MS. ZIMMERMAN: I'm sorry. I apologize. I have a  
23 habit of doing that.

24 So, yes, so we think that that -- that Abraham's  
25 report, just in its entirety, is not appropriate rebuttal,

1 and it's an attempt to backfill his general causation  
2 opinion.

3 And before I turn, I guess, to the other reports  
4 in this, I would point the Court back to kind of the way --  
5 I mean, I know that this is -- we have an MDL, so there's  
6 5,000-some cases as the Court certainly is aware, and then  
7 we have the Trombley case that's getting ready to be tried.  
8 And I think that in various different motions that have been  
9 brought, that the Defendants have attempted to kind of  
10 recast the idea or the general understanding in courts  
11 across the country about what is general causation and what  
12 is specific causation, and how does bifurcating discovery in  
13 an MDL impact expert reports down the road in cases that  
14 actually go to trial.

15 So we -- we provided some citations to the  
16 Reference Manual on Scientific Evidence and the Manual for  
17 Complex Litigation. General causation is typically  
18 understood to be essentially do the Plaintiffs have some  
19 admissible evidence to support the claims that they are  
20 making. And it's not generally understood to be this is the  
21 universe of all evidence that the Plaintiffs have, but just  
22 if Plaintiffs can't even get past this hurdle, we ought to  
23 stop this MDL right now. Stop the bleeding. If they want  
24 to go on appeal, they can do it, but let's not bother Judge  
25 Schultz and Judge Ericksen once a month and have everybody

1 bring in all these motions for years and years if the  
2 Plaintiffs can't even clear that basic hurdle. And we got  
3 past that. We certainly -- I mean, the Court made the  
4 appropriate decision and said, there is sufficient evidence  
5 here. And that's not the full universe of evidence that we  
6 know. You know, if and when we have the ability to bring  
7 folks, particularly corporate folks from 3M to the witness  
8 stand and ask them about some additional documents, I'm  
9 confident there's going to be more evidence that makes it  
10 much stronger, the Plaintiffs' claims, and the expert  
11 opinions that we've disclosed go to that as well.

12 But what Defendants have really attempted to do in  
13 their Motion to Strike in August or September, when we were  
14 here on the Plaintiffs' experts, is to say, Look, you --  
15 that's all the more you got. You're stuck with the expert  
16 reports that you disclosed on March 31st of 2017, and,  
17 essentially, this MDL is frozen in time at that point. And  
18 that's not what the Reference Manual on Scientific Evidence  
19 or the Manual for Complex Litigation contemplates. That's  
20 not typically the way an MDL is done.

21 So one thing, I think the Court has evidence and  
22 interest in being practically minded, I think it may be  
23 helpful to kind of sit down and talk about how are we going  
24 to, from an administrative standpoint, look at each of the  
25 obligations that are going to be made on these 5,000 cases

1 if we're going to trial on each one. If someone files a  
2 case tomorrow, are they limited to what was known or  
3 knowable on March 31st of 2017? I don't think that that's  
4 typically what the rules contemplate, and so I think that  
5 there may -- there may be an opportunity here for the  
6 parties and the Court to work together in a collaborative  
7 way so that we don't have this ongoing motion practice  
8 about, well, they're out, but then you should be out, and  
9 that sort of thing.

10 THE COURT: That -- that point is well taken. Is  
11 your view -- It seems to me there are three things that are  
12 going on here. No. 1 -- well, the easy one, in my view, is  
13 research, peer-reviewed articles, things that -- that are  
14 published after an expert issues their report. That seems  
15 like proper supplementation to me.

16 MS. ZIMMERMAN: We agree, Your Honor.

17 THE COURT: The second thing is what about those  
18 pieces of literature that support a previously issued  
19 opinion that were available at the time but nobody's  
20 perfect, you find them after the fact?

21 MS. ZIMMERMAN: Right.

22 THE COURT: What's your view of that? Is that  
23 out?

24 MS. ZIMMERMAN: I think it's difficult,  
25 Your Honor, because while on the one hand, you know, you are

1 right, no one is perfect, but we are afforded the  
2 opportunity to explore -- both sides are afforded the  
3 opportunity to explore the basis for an expert's opinions.

4 THE COURT: Right.

5 MS. ZIMMERMAN: And if experts are permitted to --  
6 I mean, we can turn to Dr. Mont's report. It is a monster,  
7 and it is full of new citations, the vast majority of which  
8 were certainly known or knowable. I don't think -- You  
9 know, even having deposed this guy a couple of times, I  
10 don't think I could do it in seven hours; but I do need to  
11 have that opportunity. And that's what the rules afford to  
12 the Plaintiffs here is to really understand what the basis  
13 are of the opinions so that we can -- we can know that and  
14 we can use it to potentially cross-examine and impeach him  
15 at the time of trial, and also just to make sure that he's  
16 qualified to be offering the opinions that he's offering,  
17 because as we note in our -- in our report -- or in our  
18 motion to the Court, again, we disclose two experts, an  
19 infectious disease doctor and a nephrologist. They've -- In  
20 the general causation phase, they had an infectious disease  
21 doctor, Dr. Wenzel. They promised to the jury he was going  
22 to show up. He never did. He's not had a report issued  
23 since.

24 And so now Dr. Mont, who is an orthopod, and the  
25 new anesthesiologist, who of course has got a top-to-bottom

1 new opinion on general causation and case-specific issues,  
2 and their epidemiologist are essentially trying to cover the  
3 waterfront with attacking Dr. Jarvis, our infectious  
4 disease -- yeah, our infectious disease doctor. I mean,  
5 given that these folks have previously, under oath,  
6 disclaimed expertise in infectious disease, you know, query  
7 whether they really have the capacity or foundation to serve  
8 as experts that rebut Dr. Jarvis, and that's, I guess, part  
9 of the question that we've raised with the motion here.

10 THE COURT: Right.

11 MS. ZIMMERMAN: I mean, they can bring, I guess,  
12 the experts that they want to bring.

13 THE COURT: Yeah, and I think their -- you are  
14 really arguing, in part, a *Daubert* issue I think, or you are  
15 suggesting that, which is not before me.

16 MS. ZIMMERMAN: Yeah.

17 THE COURT: But here's where I think you may find  
18 that I'm not in agreement necessarily with the Plaintiffs'  
19 position. Two things; one, I don't think their experts -- I  
20 don't think you get to -- I'm phrasing it this way, but I  
21 don't think you get to decide what their -- what experts  
22 there are; right? So if you only put up a damages expert,  
23 but you still go forward with the theory, obviously, of  
24 liability, I think they still get to bring in experts to  
25 address your theory of liability, even if -- so it's not tit



1       for tat --

2               MS. ZIMMERMAN:   Tit for tat, yeah.

3               THE COURT:   -- on who the experts are.   The second  
4       thing, and I think this really gets to Dr. Mont, on the one  
5       hand you are right, he's giving very generalized opinions  
6       on, for example, diabetes, but, you know, the risk factors  
7       for infection are specific to individuals, and so there  
8       that -- that doesn't seem to be crossing the line to me, but  
9       I think you think it does.

10              MS. ZIMMERMAN:   Well, I do think it does,  
11       Your Honor, respectfully, and I would point, in terms of an  
12       example, to the exclusion of Dr. Yadin David.   So when we  
13       did a general causation report for him, and, in retrospect,  
14       I'm not sure honestly that we needed one, because if we're  
15       talking about what the Bair Hugger is generally capable of,  
16       that probably isn't the stage of the case where we have to  
17       prove there were reasonable alternative designs then.   But  
18       he did offer a number of reasonable alternative designs in  
19       his initial report.   And then when we offered a supplement  
20       on that, evidencing, I think, seven or eight additional  
21       reasonable alternative designs, all of which were known to  
22       the Defendants at the time, the idea was, well, those were  
23       known or knowable at the time he issued his March 17th  
24       report, and so it should have been in there, and the  
25       Defendants are in some ways disadvantaged by the fact that

1       there's new general causation kind of reasonable alternative  
2       design opinions there. Fast forward now to your question  
3       about diabetes and Dr. Mont. If Dr. Mont thought that  
4       diabetes was a risk factor that predisposed patient  
5       population generally, isn't that really something that  
6       belonged also in his general causation report?

7               THE COURT: It exposes every potential -- It  
8       exposes the patient population that has diabetes.

9               MS. ZIMMERMAN: Correct, Your Honor.

10              THE COURT: And I guess the question is, is that a  
11       distinction with or without a difference?

12              MS. ZIMMERMAN: From the Plaintiffs' perspective,  
13       it's a distinction with a meaningful difference, because we  
14       would have had an opportunity to really delve into what  
15       Dr. Mont's opinions are about the role that diabetes may  
16       play in predisposing someone to infection. And now perhaps  
17       we have the opportunity to ask him that in the Trombley  
18       matter, but just as Dr. David was not permitted to say, Oh,  
19       there's also -- you know, it wasn't just the one reasonable  
20       alternative design that I pointed to, it was all these other  
21       ones, you know, we -- we think that they're really, you  
22       know, similar -- similar issues before the Court and with  
23       respect to the -- the properness, I guess, of a disclosure  
24       and whether something is general causation or case-specific.

25              And then turning also to the anesthesiologist, I

1 think it's Dr. Dutton, it's certainly not Plaintiffs'  
2 position that each set of -- and I think I've represented  
3 this to the Court before -- that each party is going to be  
4 forever limited to those experts that were disclosed in the  
5 general causation phase or that we used in Gareis, because  
6 at this point, it's looking like we have a lot of cases and  
7 potentially a lot of trials to have; however, we certainly  
8 would need to depose Dr. Dutton on issues including both  
9 general causation and specific causation, because I can't  
10 impeach him with the deposition testimony or the trial  
11 testimony from Dr. Hannenberg, because they probably have  
12 different opinions.

13 And so I guess then the next question the  
14 Plaintiffs have are, well, could we -- if, for example, I  
15 get a new expert that's going to opine on a reasonable  
16 alternative design, do I get a new report top to bottom, put  
17 all of the stuff in that the Court wouldn't let me put in  
18 with respect to the Axline case and Dr. David? I mean, I  
19 don't want to forecast problems for the Court, but there's a  
20 couple cooking -- a couple are cooking down the road, you  
21 know, and so I guess those are some of the issues that are  
22 certainly percolating from the Plaintiffs' perspective, and  
23 we think that it really does impact, you know, the ability  
24 to try the Trombley case in a fair manner, and it's going to  
25 impact the rest of the MDL, what ultimately gets decided

1 about -- about disclosures and limitations on those.

2 THE COURT: Okay.

3 MS. ZIMMERMAN: I think you -- you generally  
4 understand, and I'm happy to answer any questions that you  
5 have or forecast additional issues for the Court. You've  
6 had enough this morning it sounds like.

7 THE COURT: Please don't. Well, let me just tell  
8 you where I -- where I am in terms of I -- how I think I'll  
9 approach this whole issue. I think that there's broad,  
10 though not precise agreement between the parties, even on  
11 what the general principles are here about what's proper and  
12 not proper; maybe not. But I plan to look very carefully at  
13 each and every report and try and make a determination about  
14 whether it's -- you know, is it specific to the case or  
15 appropriate context, or is it really kind of a do-over.

16 MS. ZIMMERMAN: Right.

17 THE COURT: And that's what I think you're asking  
18 me to do, and that's what I think I probably have to do.

19 MS. ZIMMERMAN: Yeah, I'm sorry to put that burden  
20 on the Court, but that is what we're asking.

21 THE COURT: Yeah.

22 MS. ZIMMERMAN: And I think I kind of envision  
23 it like a -- I mean, I don't know if it would be helpful to  
24 the Court the way we do before a trial when we sit down and  
25 rule on objections in depositions or something. We're happy

1 to assist in any way we can, but we do think that that --

2 THE COURT: No, you've highlighted everything, and  
3 that does assist the Court, but, okay.

4 MS. ZIMMERMAN: And I'll obviously stand by to  
5 answer any questions the Court may have.

6 THE COURT: One other that's going to sound  
7 frankly very picky, but some of the highlighting you've  
8 given me is in different colors. I am assuming that the  
9 color of the highlighting is not of significance to the  
10 argument; correct?

11 MS. ZIMMERMAN: Yeah, not significant enough to  
12 trouble Your Honor with it.

13 THE COURT: Okay. All right. Thank you.

14 MS. ZIMMERMAN: Thank you.

15 THE COURT: Mr. Goss? Ms. Harris?

16 MR. GOSS: Thank you, Your Honor. May it please  
17 the Court. So I'm here to tell you that you don't have to  
18 do it. You don't have to rewrite our experts' reports.

19 THE COURT: You know I like him better now; right?

20 MR. GOSS: You don't have to do it, and here's the  
21 reason why. So -- And there's been a lot of replowing of  
22 old ground and talk of recasting and foreshadowing, but I  
23 really want to focus on what's in front of the Court right  
24 now. And really the -- the key precedent to this motion is  
25 the Court's prior motion on the David and Bushnell --

1 Plaintiffs' -- actually, Defendants' prior motion on the  
2 David and Bushnell reports. And what the Court ordered in  
3 that case was not that general cause discovery is forever  
4 set in stone, that these expert reports are forever set in  
5 stone, that you can never cite an article in future reports  
6 that you already cited somewhere else, or that you can't  
7 bring in any new articles. What the Court ruled, and Judge  
8 Ericksen affirmed, is that you can't bring in an expert who  
9 has major new opinions previously undisclosed. So we were  
10 confronting --

11 THE COURT: On general causation?

12 MR. GOSS: On general causation, right, and that's  
13 an important distinction, because the reports that we  
14 challenged previously really were not case-specific. They  
15 weren't specific to Nancy Axline's case. David titled his a  
16 supplemental expert report, and he raised these seven new  
17 alternatives that he wanted to talk about. And -- and  
18 that's an important distinction because, as the Court  
19 recognized at the time, we no longer had the opportunity to  
20 get discovery from the manufacturers about -- about those  
21 devices, and the feasibility of turning one of those things  
22 into the Bair Hugger or vice versa, and that's really what  
23 was going to be the issue to be tried.

24 So Dr. Jarvis issued a case-specific report in  
25 Axline, and he talked a lot about general things. He talked

1 about the McGovern study. He talked about the CFD. He  
2 talked about Stocks and Darouiche. But we took that to be  
3 his analysis of those sources in the context of Ms. Axline's  
4 case. He also brought in a new article, and we didn't  
5 challenge that report because it was a case-specific report.  
6 We challenged the two that were not case-specific. There  
7 was David, which was, by its own terms, a supplement, and  
8 there was Bushnell, which was -- everybody agreed was a  
9 sur-rebuttal to Dr. Abraham.

10 So -- so I think, you know, there's --  
11 Ms. Zimmerman talked about recasting specific versus general  
12 causation discovery. I don't think this order did that. I  
13 think what this order did was it said, here's a guy with  
14 seven new opinions on a major issue that the trier is going  
15 to have to decide, and we're on the eve of trial, so we're  
16 not going to do that. So that's the -- the scope issue.

17 THE COURT: Let me stop you for a second.

18 MR. GOSS: Sure.

19 THE COURT: I think Ms. Zimmerman said that -- or  
20 maybe I merely viewed it this way -- that when you compare  
21 Dr. David to Dr. Mont, they are almost like they are on a  
22 spectrum. David comes in and says, Here are seven  
23 additional alternative designs. Dr. Mont says, Geez,  
24 there's a number of risk factors. She has these. And those  
25 are not entirely dissimilar, although I understand that

1 Dr. Mont's discussion of, for example, diabetes may not  
2 apply and wouldn't be applied to Ms. Axline.

3 MR. GOSS: Right.

4 THE COURT: So here's the question, are those on a  
5 spectrum? Is there a line between them? And is there a  
6 disclosed general causation expert on your side of the case  
7 that talked about all the risk factors for infection?

8 MR. GOSS: The answer to the last question is --  
9 is yes.

10 THE COURT: And who is that?

11 MR. GOSS: And so it was Dr. Mont, but also  
12 Dr. Wenzel, and we didn't promise the jury that he would  
13 come to trial. Plaintiffs did. But that's neither here nor  
14 there. Dr. Wenzel, Dr. Borak, and I couldn't point you to  
15 the chapter and verse exactly, but I know diabetes came up,  
16 so it's not a new issue.

17 THE COURT: Okay.

18 MR. GOSS: And the difference, it's a difference  
19 in kind and not in degree. Because the difference is  
20 Dr. Mont is issuing a case-specific opinion about  
21 Ms. Trombley who has diabetes. He can't do a specific  
22 causation analysis without addressing her diabetes.  
23 Dr. Jarvis, in his case-specific report for Ms. Trombley,  
24 addresses her diabetes, and he says, I ruled it out.

25 So -- Which that also gets to this question of



1        what's rebuttal and what isn't. And we've been over this a  
2        few times, but really what the rule says is what's rebuttal  
3        and what's initial depends on the burden of proof, which  
4        party has the burden of proof. So it doesn't depend on  
5        timing, and it doesn't depend on, oh, is this person  
6        responding point for point to this person. It depends on  
7        the burden of proof.

8                And so what all of our experts are doing in their  
9        Trombley case-specific reports is responding to things that  
10       Dr. Jarvis says. He talks about CFD. He talks about the  
11       heating, ventilation and air conditioning. Now, he may or  
12       may not have expertise in those things, but clearly he  
13       intends to talk about them. And unless Plaintiffs are going  
14       to say, We're not going to show the CFD, we're not going to  
15       talk about it, we have to be able to rebut it with -- with  
16       Dr. Abraham. And so what he is doing is -- is rebutting  
17       Dr. Jarvis.

18               And -- and if the Court would like to hear, I can  
19       kind of elaborate on Dr. Abraham's exuberant additions of  
20       literature and why -- why that happened, why he's doing  
21       that.

22               THE COURT: I would. Do you understand why --  
23       what I -- Do you understand why I said what I said at the  
24       beginning of this, that I was perhaps most troubled by  
25       Dr. Abraham's report?

1 MR. GOSS: I do, Your Honor. I do.

2 THE COURT: Okay.

3 MR. GOSS: Because he added a lot of citations,  
4 but here's the reason why. When he testified at the Gareis  
5 trial, he wanted to talk about something that was in his  
6 rebuttal report where he said that the opening and closing  
7 of doors has a substantial effect on airflow in the  
8 operating room, okay. And he was starting to testify about  
9 that, and then he wanted to talk about a study that was  
10 cited in Dr. Elghobashi's initial report, but it wasn't  
11 cited in Dr. Abraham's report. And it's the Saarinen study,  
12 a study out of Finland that actually did a CFD analysis  
13 backed by a smoke experiment to show the movement of air  
14 when a mannequin moves through a door and into a room, okay.  
15 And Plaintiffs objected. They said Rule 26, Your Honor, he  
16 doesn't get to talk about that because it wasn't in his  
17 report. It was in Dr. Elghobashi's, but it wasn't in his,  
18 so he doesn't get to talk about that.

19 And there was a lengthy sidebar. I have the trial  
20 transcript from that discussion. But Dr. Abraham could see  
21 that there was a chance he wasn't going to be able to talk  
22 about this issue that was actually pretty significant to his  
23 analysis of Mr. Gareis' -- specific causation in  
24 Mr. Gareis's case, so -- and then ultimately the Plaintiffs  
25 based -- one of their arguments for a new trial in Gareis

1 was that -- that his testimony about the Saarinen article  
2 was allowed, and Plaintiffs said that that's -- it was a  
3 violation of Rule 26, and -- and that it was prejudicial.

4 And so what the -- I have it here somewhere. What  
5 the Court ultimately ordered on the -- denied the motion for  
6 a new trial, and on page 9 of the order, this is Document  
7 No. 519, the Court said, Dr. Abraham's report did opine on  
8 the phenomenon behind the Saarinen study, and she quotes his  
9 initial report on that. She notes that the admission of the  
10 evidence was not prejudicial to Plaintiffs because the  
11 meaning of the Saarinen study was painfully clear to  
12 everybody that if you open a door, you can feel the wind,  
13 it's going to have an impact on the airflow. Okay. So she  
14 denies the motion for a new trial.

15 But this was a serious enough issue for Plaintiffs  
16 to raise it in a lengthy sidebar during his testimony and to  
17 base a request for a new trial in Gareis on it. So he felt  
18 compelled to come back and say, All right, you are saying I  
19 didn't disclose enough. Now I'm going to disclose a number  
20 of articles that are going to address this point; so really  
21 Plaintiffs, to some degree, invited the supplementation.

22 Now is he going to talk about each of these  
23 studies at trial? No, he's not. Ultimately he just needs  
24 to be able to show the evidence -- the scientific evidence  
25 that opening and closing doors in a surgery like

1 Ms. Trombley's would -- would make a huge difference in  
2 airflow and would make any air coming out of the Bair  
3 flow -- Bair Hugger essentially irrelevant.

4 THE COURT: Let me ask you this, do you have  
5 accessible to you Dr. Abraham's report in this case?

6 MR. GOSS: Yes, I do.

7 THE COURT: So let's look at -- let's look at  
8 page 18 of the report. There's a bunch of pictures there in  
9 green light -- or green-lighted conditions showing they are  
10 stills from a video, I guess.

11 MR. GOSS: Yeah.

12 THE COURT: Flow visualization of recirculation  
13 area under different shaped luminaries or luminaires.

14 MR. GOSS: Oh.

15 THE COURT: I would call those lights, but in any  
16 event.

17 MR. GOSS: Let's see, 18 -- Are you sure it's 18?

18 THE COURT: Maybe not. No, it's 5. I'm sorry. I  
19 have -- I have it on a thing that also --

20 MR. GOSS: Okay.

21 THE COURT: -- gives me different numbers.

22 So --

23 MR. GOSS: Yes, I see it.

24 THE COURT: -- did Dr. Abraham, in his initial  
25 report, talk about the effect of essentially lamps in the

1 operating room on circulation?

2 MR. GOSS: Yes.

3 THE COURT: And were these -- and now we're  
4 getting really kind of nitty-gritty on this. Were these  
5 photos or this video discussed before?

6 MR. GOSS: No.

7 THE COURT: Okay.

8 MR. GOSS: Not this article.

9 THE COURT: So here's their point, I think, and  
10 the reason I have concern or I'm not certain what to do  
11 about Dr. Abraham is it seems like all of this stuff is not  
12 case-specific but rather general and could have been  
13 disclosed before, and so how isn't that just the same as, I  
14 believe it was -- who was it other than Dr. David?

15 MS. ZIMMERMAN: Yadin David or Nathan Bushnell.

16 THE COURT: Yeah, why isn't this just like Nathan  
17 Bushnell?

18 MR. GOSS: Because it's not a sur-rebuttal for one  
19 thing, and that's why Bushnell was excluded.

20 THE COURT: It's a supplementation in your view?

21 MR. GOSS: Well, it is. It -- it's -- Well, what  
22 it is is it's a further discussion of why lights matter.  
23 There were surgical lights in Ms. Trombley's surgery. They  
24 were moved during the surgery. And essentially what -- the  
25 way I see Plaintiffs' argument, it's kind of like, well, you

1 know, you cited cases in support of your motions in the MDL,  
2 so now when you bring motions in in Trombley, you won't be  
3 able to cite those cases again. Really, citing literature  
4 is kind of like citing cases. You don't boil the ocean the  
5 first time you do it. You may go back and you find  
6 additional things that further support your point, but  
7 really what I want to make clear is that this -- he ties  
8 this to his analysis of Ms. Trombley's case of what would  
9 have or could have happened in her OR. So this is not --  
10 this is not a report that we intend to submit as an MDL  
11 report.

12 THE COURT: Right.

13 MR. GOSS: This is a case-specific report. And  
14 he's really again responding to Dr. Jarvis who says, yeah,  
15 lights don't cause infections, cabinets don't cause  
16 infections, nothing causes infections except the Bair Hugger  
17 in terms of what was in that room, and this is Dr. Abraham,  
18 again, elaborating on that in the context of her case; and,  
19 again, with a view toward, he had this experience where he  
20 almost didn't get to testify about certain things because  
21 there was an argument about whether he had adequately  
22 disclosed them.

23 THE COURT: Got you. Okay.

24 MR. GOSS: Okay.

25 THE COURT: Anything further, Mr. Goss, that we

1       should talk about?

2               MR. GOSS: I will take a quick look at my notes,  
3       but...

4               Oh, the only other thing I would say, Your Honor,  
5       and this kind of goes to the lack of prejudice, so the *Aviva*  
6       *Sports* case is kind of on point. This is from 2011. It's  
7       829 F.Supp.2d 802 at page -- let's see -- I have the head  
8       notes -- oh, 820 to 821.

9               THE COURT: Okay.

10              MR. GOSS: So there's -- This is in the context of  
11       a summary judgment motion where the party resisting the  
12       motion brought in new expert reports to respond to the  
13       arguments made in favor of summary judgment, and there was a  
14       motion to strike those -- those reports. And what Judge  
15       Ericksen said here is -- is that the other side argues that  
16       these declarations are new opinions which were submitted  
17       outside the discovery deadline. The Court does not find  
18       that these declarations contain new opinions, they contain  
19       no new material information and present no opinions that  
20       were not provided during discovery. So, you know, that  
21       supports the idea that it's okay to provide additional  
22       support as long as you aren't opening up a new front on the  
23       battlefield.

24              The other thing that I would --

25              THE COURT: That's your point about Dr. David?

1 MR. GOSS: Yeah -- yes, sir.

2 THE COURT: Okay.

3 MR. GOSS: And the other thing I want to say is  
4 this isn't a situation where these reports, you know, come  
5 out and there's no opportunity to do any discovery about  
6 them. We've offered depositions for each one of these  
7 experts. Two -- two of them have been accepted.  
8 Dr. Abraham, we don't have an accepted date for him yet.

9 THE COURT: Okay.

10 MR. GOSS: But there's an opportunity to explore  
11 these things and decide how much they matter or don't  
12 matter, so that -- that's my last point on it, Your Honor.

13 THE COURT: Okay. Thank you.

14 Yeah, go ahead, Ms. Zimmerman.

15 MS. ZIMMERMAN: Thank you, Your Honor. I want to  
16 start kind of with this discovery piece at the end, because  
17 I think one thing we've missed a few times, and this is --  
18 I'll take this on myself with respect to Yadin David,  
19 discovery on general causation issues concluded the day that  
20 we provided our reports, so the notion that any reasonable  
21 alternative design that was identified by Yadin David that  
22 they would have had the opportunity to do discovery on it,  
23 that's just false. I mean, discovery was closed that day.  
24 So I appreciate that that's kind of touching back on this --  
25 the order and the dispute we had in the fall, but it's not



1 actually that they would have had the opportunity to do  
2 discovery on these third-party witnesses or companies that  
3 had other products, and, by the way, they were known very  
4 well to the Defendants. Mr. Goss referred to Dr. Jarvis'  
5 report -- the case-specific reports he's done in Gareis and  
6 Axline and now in Trombley, and you are right, and he's  
7 right, they definitely -- he cites back to McGovern, but  
8 that was cited in his general causation report. And so they  
9 have had, you know, multiple depositions now to explore his  
10 opinions with respect to how McGovern, you know, addresses  
11 the general causation piece, and then get into what they  
12 really think about the case-specific opinions that he's  
13 offering.

14 Abraham is a different boat altogether. Mr. Goss  
15 makes the argument that Dr. Abraham was nearly excluded from  
16 providing testimony. Yeah, that's right. It wasn't in his  
17 report, despite the fact that apparently Dr. Abraham thought  
18 that this was so specific and critical to his analysis, so  
19 specific and critical, but it wasn't cited anywhere in his  
20 report; so, yeah, we -- we made a motion, and we did have a  
21 sidebar that said he shouldn't be allowed to use this --  
22 this report and this video that he had never talked about.  
23 And we still think that was error, and I appreciate that --  
24 you know, that that's an issue before the Eighth Circuit at  
25 this point. But the Plaintiffs are entitled to know what

1 the Defendants' experts are going to testify about at trial,  
2 and we are entitled to explore the basis for that so we can  
3 bring appropriate motions and figure out both at the *Daubert*  
4 stage, if necessary, or motions in limine, or, you know,  
5 during trial objections about foundation, and that's  
6 absolutely something we're entitled to do.

7           So I really do think that, you know, as we compare  
8 kind of Mont and Yadin David, you know, if you look at their  
9 general causation reports, you know, Mont then -- you know,  
10 what should he have in there if he's going to opine on risk  
11 factors that may predispose someone to an infection.  
12 Shouldn't he have a generalized discussion, I guess, if  
13 there are risk factors out there? Opioids is new in  
14 Trombley. He hadn't talked about opioids before. Diabetes,  
15 I mean, that's not exactly some sort of rare condition.  
16 There's a tremendous number of people in the population that  
17 suffer from diabetes. We think that any opinions about  
18 diabetes and the role that may play in general causation  
19 ought to have been disclosed back then, and that attempts to  
20 put in 10 or 15 or 20 new articles on each of these things,  
21 that that's not timely, and it shouldn't be permitted. So I  
22 appreciate the Court's time today, and obviously happy to  
23 answer any questions you may have.

24           THE COURT: So now I hear your argument a little  
25 bit differently, but maybe in addition to what I said

1 earlier, you are saying, in a sense, that Dr. Mont is like  
2 Dr. David because Dr. Mont is saying there are risk factors,  
3 and here they are as they apply to Ms. Trombley?

4 MS. ZIMMERMAN: Yes.

5 THE COURT: And then he identifies risk factors  
6 that weren't disclosed, at least according to your argument  
7 before; right?

8 MS. ZIMMERMAN: Yes, Your Honor.

9 THE COURT: And so Dr. David said, there are  
10 reasonable alternative designs.

11 MS. ZIMMERMAN: There's a couple.

12 THE COURT: And here's a couple, and now I want to  
13 tell you --

14 MS. ZIMMERMAN: Yeah.

15 THE COURT: -- there's seven other ones?

16 MS. ZIMMERMAN: Yep.

17 THE COURT: Okay. Okay. This case is set for  
18 trial May --

19 MS. ZIMMERMAN: May 13th, I believe.

20 THE COURT: May 13th?

21 MS. ZIMMERMAN: Yes. And Your Honor had given us  
22 through, I think -- anticipating -- I don't know if you are  
23 able to rule from the bench today, but that we will have I  
24 think until the 21st to complete depositions on this.

25 THE COURT: Of this month?

1 MS. ZIMMERMAN: Of this month, like two weeks.

2 THE COURT: Yeisch (phonetic).

3 MS. ZIMMERMAN: Abraham is at least local. I  
4 can't speak to his schedule, but he is here. He's at  
5 St. Thomas, so he's a little bit closer, and I don't know  
6 that we're going to take the depositions of all these folks,  
7 but it depends on --

8 THE COURT: Right. Here's what I would say --  
9 Shoot. To the extent that we don't get the order out as  
10 quickly as we did in the -- in the other motion in Axline,  
11 if I allow, right, you gotta have the opportunity to depose  
12 them. And I know that that's not always a great solution  
13 because, of course, you've got that thing called trial  
14 coming up; but to the extent that it helps, rest assured  
15 that if -- if we get the motion out, and it's the 20th, and  
16 we say, yeah, Dr. Mont is in, you don't have to depose him  
17 the next day. We'll figure that out.

18 MS. ZIMMERMAN: Thank you, Your Honor.

19 THE COURT: Okay.

20 MS. ZIMMERMAN: And it's not our expectation that  
21 Dr. Mont obviously would be excluded completely.

22 THE COURT: Right.

23 MS. ZIMMERMAN: But, you know --

24 THE COURT: But what opinions or what he can say,  
25 understood.

1 MS. ZIMMERMAN: Yeah.

2 THE COURT: Okay.

3 Yep, Mr. Goss.

4 MR. GOSS: So a date has been accepted for  
5 Dr. Mont's deposition.

6 THE COURT: Okay.

7 MR. GOSS: Obviously we can meet and confer if  
8 that needs to change, but I think it's the 21st -- --

9 MS. ZIMMERMAN: I think that's right.

10 MR. GOSS: -- is the date that's been accepted.  
11 And then the only other thing I want to just be -- make sure  
12 I'm clear on is Dr. Jarvis says in his report, I ruled out  
13 diabetes.

14 THE COURT: Right.

15 MR. GOSS: So Dr. Mont has to be able to respond  
16 to that in some fashion.

17 THE COURT: Understood. Okay. Anything further  
18 we need to talk about today?

19 MR. GOSS: I wasn't prepared to talk about  
20 anything else, Your Honor.

21 MS. ZIMMERMAN: I don't think so. Thanks.

22 THE COURT: All right. What I would say in  
23 general, I think following up on Ms. Zimmerman's point, is  
24 it -- it might make some sense for the parties to confer on  
25 some kind of general ground rules. Yes, you can cite to

1 reports issued at this time or something like that. It  
2 certainly would be a productive discussion in my view.

3 MS. ZIMMERMAN: We're happy to do that,  
4 Your Honor.

5 MR. GOSS: Yeah, sure.

6 THE COURT: Okay. Okay. Thank you. Court is in  
7 recess.

8 MR. GOSS: Thank you, Your Honor.

9 THE LAW CLERK: All rise.

10 (Court adjourned at 12:02 p.m.)

11 \* \* \*

12  
13  
14 I, Erin D. Drost, certify that the foregoing is a  
15 correct transcript from the record of proceedings in the  
16 above-entitled matter.

17  
18 Certified by: s/ Erin D. Drost

19 Erin D. Drost, RMR-CRR  
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